

October 4, 2016

VIA ELECTRONIC FILING: <http://www.regulations.gov>

Consumer Financial Protection Bureau
Office of the Executive Secretary
1700 G Street, NW.
Washington, DC 20052

Re: CFPB Docket No. CFPB-2016-0025 – Comments to Proposed Rule on “Payday, Vehicle Title, and Certain High-Cost Installment Loans”

Dear Sir/Madam:

On behalf of Activehours, Inc. (“Activehours”), thank you for the opportunity to provide comments on the proposed rule issued by the Consumer Financial Protection Bureau (“Bureau”) on Payday, Vehicle Title, and Certain High-Cost Installment Loans (“Proposed Rule”), CFPB Docket No. CFPB-2016-0025.¹

Activehours supports the Bureau's desire to protect consumers from harmful practices through the Proposed Rule and appreciates the Bureau's interest in whether providers of non-recourse liquidity should be included in the rule.

Activehours customers include users who used to go to payday loans as well as those who got overdraft fees and late fees from credit cards and delayed bill payments. We see the turmoil that these products create first hand. Reports put the annual overdraft fees at \$32 billion and late fees on credit cards at \$56 billion. It's shocking that each of these exceed what the country spends on fresh vegetables. The annual cost of such products exceeds \$100 billion.

Many people who go to payday loans, or get overdrafts or late fees have earned the money that they need, but don't have access to that pay. This concept of holding back people's pay, or paycycles, is a relatively recent practice. Centuries ago, society did not accept this. The Bible, Torah and other ancient scriptures state that employers should pay their employees every day.² While we have moved away from same day pay for individuals, it's common for businesses to be paid at once. When you buy a coffee at Starbucks, you have to pay at once. When you take a cab ride, or watch a movie, or shop at Walmart, you have to pay at once. Businesses know that getting paid fast is good for them. It's also good for people. Immediate access to pay would save tens of billions of dollars every year, for the people who can least afford it.

Activehours sees in the forays made by it and others into this space as proof that technological advances make it possible to give consumers ways to manage their money without assuming a legally enforceable obligation to repay any funds received. Although such products fill a need that many consumers have historically met with various small dollar loans, non-recourse liquidity products work very differently than loans. Because consumers do not assume an obligation to repay funds provided through a service such as Activehours', such services do not pose the risks that the Bureau seeks to prevent and therefore belong outside its scope.

¹ 81 Fed. Reg. 47864-01 (July 22, 2016).

² See, e.g., Deuteronomy 24:15 (New Revised Standard Version) (“You shall pay them their wages daily before sunset, because they are poor and their livelihood depends on them. . . .”).

Activehours believes that the Bureau recognizes this fundamental distinction and reads the rule to exclude non-recourse liquidity services such as Activehours'. Activehours urges the Bureau to be more explicit about this exclusion, however. Failing to add an explicit exemption from the Proposed Rule may limit the growth of non-recourse liquidity providers and stifle their efforts to disrupt the very industry that the Bureau believes is harming consumers.

Accordingly, Activehours requests that the Bureau revise the definitions of "lender" and "covered loan" to make clear that non-recourse liquidity services and providers of such services are not covered by the rule.

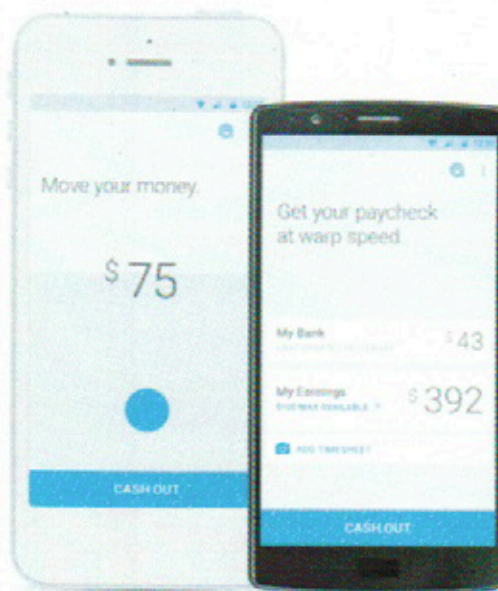
I. Activehours Makes Access To Pay a Right, Not a Privilege.

Activehours is a technology company that gives consumers easy access to the pay they have already earned, without waiting for payday. Activehours has built what is basically a payroll system, but done so by getting the information needed with the employee's consent, rather than with the employer's consent. By putting control of this payroll system in the hands of the employee, Activehours lets them, rather than employers, control when workers get paid. It provides its service without mandatory fees, with employees paying only "what they think is fair." This flexibility allows workers to manage their cash flow and to spend their wages according to their own needs and schedule, not the arbitrary schedules that employers adopt to meet the minimum requirements of state labor laws.

The idea for Activehours started when I began helping some of my employees who couldn't wait till payday by writing small checks for them out of my bank account. Millions of owners and managers at small businesses do this. Like them, I did not believe that my employees always had to wait till payday for their money. I knew how much they had earned. I had all the information the payroll system needed and could calculate what their earnings would be. I continued to do this even after I left the company. I was then approached by people who I didn't know to see if I would do it for them. I agreed to do it for them as well, as long as I could get the information that their company's payroll system was using. Today, Activehours does it for employees from over 10,000 companies.

The Activehours service is simple to use and is like an ATM for wages. When a user creates an account, Activehours automatically pulls the user's bank transaction history. Users can also provide data from attendance information from their employer's system to Activehours through the app. Activehours has integrated with several time and attendance systems to make this process easy. Once Activehours verifies the hours a worker has worked, Activehours allows the worker to accelerate the distribution of her paycheck based on the worker's expected take-home pay ("Cashout"), subject to certain limits. Activehours deposits the funds directly into the worker's bank account either instantly or overnight, depending on the bank the worker uses.³

³ See <https://activehourshelp.zendesk.com/hc/en-us>.



On the worker's regularly scheduled payday, Activehours automatically withdraws the amount of the Cashout from the worker's bank account. This allows workers to use Activehours directly, without relying on their employers. Activehours does not charge any fees for its service. Instead, workers may choose to pay a voluntary tip, which is automatically withdrawn, if authorized, on the worker's payday.

When Activehours accelerates a wage distribution to one of its users, Activehours, not the user, bears the risk of nonpayment by the employer and the risk of default by the worker. If the account to which the worker has provided Activehours access does not have sufficient funds to repay the accelerated wage distribution or if the user closes the account before the paycheck is scheduled to arrive, Activehours does not have the right to collect the accelerated wage from the user or the employer. Activehours' only recourse is to deny the user access to the service until the user pays the outstanding distribution.

In addition, failure to repay an accelerated wage distribution does not affect the user's credit. Activehours does not furnish information about its users to credit reporting agencies or other creditors. The only consequence for a user who reneges on the obligation to repay a Cashout is that he or she cannot receive another Cashout until the earlier one is repaid.

Allowing people to access their wages can keep them out of products that take advantage of their difficult situation. Here are some quotes from Activehours' users:

Heather from Arizona: I was living paycheck to paycheck when my employer offered me a better position in the company. The new job involved a lot of travel. Since I had to use my own money before being reimbursed on my first paycheck, I was stuck. I couldn't afford to front the money. If it hadn't been for Activehours, I would have had to let that position go. Activehours allowed me to independently advance my career.

Crystal from Georgia: Being a single mom can be hard, especially when you don't have two incomes. I like to use the Activehours app because after paying all of my bills every week, I'm usually broke. This app gives me peace of mind. I don't have to put life on hold or worry about if I'm going to be able to feed my family that week. It comes in handy when I simply need gas or if I want to treat myself to a pedicure. Thanks Activehours for helping me when I need it most.

Zach from Virginia: Last year, my wife had to change jobs from a full time teacher's assistant to a part time preschool teacher because we were having to regularly travel out of state to take care of her grandmother. Because of the travel and the pay cut, we were much tighter on cash than normal. We made due for the most part until Christmas time. Our car battery died and had to be replaced. Suddenly, the budget to ensure our daughter had a Christmas was completely shot to shambles. We were behind. Luckily, I had just recently downloaded Activehours. It saved us immediately on the car battery and kept us afloat through Christmas. Our daughter got to see Christmas as she has every year. As a parent, the relief involved in that is absolutely unexplainable.

II. The Bureau Should Explicitly Exclude Non-Recourse Advances from the Proposed Rule's Definitions of "Lender" and "Covered Loan."

The Bureau proposes broad definitions of "lender" and "covered loan" under the Proposed Rule. Under proposed 12 C.F.R. § 1041.2(11), "lender" is defined to mean "a person who regularly extends loans to a consumer primarily for personal, family, or household purposes." The Bureau notes that "[t]his proposed definition is broader than the general definition of creditor under [the Truth in Lending Act] in that, under this proposed definition, the credit that the lender extends need not be subject to a finance charge as that term is defined by Regulation Z, nor must it be payable by written agreement in more than four installments."⁴ The breadth of this definition is intended to prevent lenders from shifting their fee structures so as to fall outside of traditional Regulation Z concepts and thus outside the coverage of the Proposed Rule.⁵

On its face, the Proposed Rule's definition of "lender" does not capture non-recourse liquidity services such as Activehours'. Free advances made with no agreement to repay are not "loans." These types of transactions are not regulated as credit by the Truth in Lending Act, and generally fall outside the commonly accepted definition of "loan." "Loans" are transactions in which the person receiving funds agrees to repay them, creating an enforceable obligation that gives the provider a legal right to collect the debt if the borrower fails to repay.⁶ Where an advance is made without an agreement to repay, however, the provider's sole recourse is to refuse to make additional advances. The borrower has no enforceable financial obligation to the financier.

Activehours' users do not agree to repay Cashouts, and Activehours has no legal recourse if a user does not repay a Cashout. Nor does a Cashout include any of the other features often associated with loans, such as interest, fees, or a designated timeline for repayment. Thus, Activehours does not extend "loans" as traditionally defined, and does not qualify as a "lender" under the Proposed Rule.

⁴ 81 Fed. Reg. at 47906.

⁵ *Id.*

⁶ See, e.g., *Refinance Corp. v. Northern Lumber Sales, Inc.*, 163 Cal. App. 2d 73, 75-76, 80 (finding that an agreement to purchase a company's accounts receivable without recourse was not a loan because there was no guaranty of repayment of the purchase price); *Transmedia Rest. Co. v. 33 E. 61st Street Rest. Corp.*, 710 N.Y.S.2d 756, 759 (N.Y. Sup. Ct. 2000) (finding that the parties' transaction was not a loan where the provider bore the risk of not being repaid); *In re Golden Plan of California, Inc.*, 829 F.2d 705, 708-11 (9th Cir. 1986) (finding a sale, rather than a loan, where the contractual risk of loss fell on the financier because there was no recourse against the merchant receiving the financing); John Clark, *International Dictionary of Insurance and Finance*, p. 208 (2013) (defining "loan" as a "[s]um of money borrowed by one person or organization from another on condition that it is repaid, generally for a specified time and often at an agreed rate of interest"); Erik Banks, *The Palgrave Macmillan Dictionary of Finance, Investment and Banking*, p. 308 (2010) ("Loans are typically documented through formal credit agreements that specify precise terms and conditions, including interest and principal repayment schedule, covenants, and events of default.") (emphasis omitted).

For similar reasons, Activehours' service does not fall under the Proposed Rule's definition of "covered loan." Under proposed 12 C.F.R. § 1041.3(b), "covered loan" is defined as "closed-end or open-end credit that is extended to a consumer primarily for personal, family, or household purposes that is not excluded [from the rule]." The Proposed Rule adopts the definition of "credit" set forth in the Truth in Lending Act, which describes credit as "the right to defer payment of debt or to incur debt and defer its payment."⁷ Although "debt" is undefined, "credit" is a common synonym for "loan."⁸ As discussed, Activehours' users do not receive loans because they do not agree to repay Cashouts. For the same reason, Activehours' users do not become personally liable for a debt after they receive a Cashout—Activehours has no legal right to be repaid. Given that Cashouts do not qualify as credit, they are not "covered loans" under the Proposed Rule.⁹

States' exclusion of Activehours' service from their regulation of payday loans further demonstrates that a Cashout is not a loan. For example, recently, Alaska's Department of Commerce, Community, and Economic Development's Division of Banking and Securities (the "Division"), sent Activehours a letter inquiring whether Activehours may have been making or offering to make payday advances to Alaska residents.¹⁰ After Activehours explained its service, however, the Division withdrew its inquiry, effectively agreeing that Activehours is not subject to Alaska's payday regulations.

Although the terms proposed by the Bureau exclude services such as Activehours', the Bureau recognizes that the breadth of the proposed definitions creates some risk of misinterpretation. In the preamble to the Proposed Rule, the Bureau acknowledges the existence of services

providing financial management services to low- and moderate-income consumers which include features to smooth income. The Bureau solicits comments on whether such entities are, or should be, excluded from the definition of lender, and if so, whether the definition should be revised. For example, the Bureau solicits comment on whether companies that . . . charge a regular membership fee which is unrelated to the usage of credit, should be considered lenders under the rule.¹¹

Although Activehours believes that its services do not fall within the scope of the proposed definitions, it urges the Bureau to clarify any potential misimpression by adopting an express exclusion of non-recourse liquidity services such as Activehours'. Activehours' service presents none of the consumer harms that the Proposed Rule is designed to address. Rather, its service, like other excluded services such as pawn, provides consumers with access to liquidity on terms that avoid the injuries that the Bureau believes are created by short term consumer loans and high interest longer term loans.

⁷ See 81 Fed. Reg. at 48189; 12 C.F.R. § 1026.2(a)(14).

⁸ See John Clark, *International Dictionary of Insurance and Finance*, p. 208 (2013) (defining "credit" as "a loan of money"); Erik Banks, *The Palgrave Macmillan Dictionary of Finance, Investment and Banking*, p. 127 (2010) (defining "credit" as "[a] loan, financing, or other form of borrowing") (emphasis omitted); see also Black's Law Dictionary (10th ed. 2014) (defining "debt" as "[l]iability on a claim; a specific sum of money due by agreement or otherwise").

⁹ Activehours' exclusion from the definitions of "lender" and "covered loan" is consistent with the lack of evidence or discussion in the Proposed Rule of the Bureau's authority to regulate consumer services like Activehours'. The Bureau issued the Proposed Rule pursuant to its authority under Section 1031(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act to regulate unfair, deceptive and abusive acts and practices. See 12 U.S.C. § 5531(d). Activehours' services do not qualify as unfair, abusive, or deceptive under the reasoning set forth in the Proposed Rule or otherwise, and therefore are not subject to regulation under the authority the Bureau invokes.

¹⁰ Included as Exhibit A to this letter are copies of Activehours' relevant communications with the Division.

¹¹ 81 Fed. Reg. at 47906.

A. Activehours' Service Poses None of the Problems that the Proposed Rule Is Designed To Regulate.

Activehours' service and others like it bear no resemblance to the types of loans that the Proposed Rule is intended to address. In the preamble to the Proposed Rule, the Bureau explains that the broad prohibition on short term loans of any sort and high interest installment loans is driven by a concern about the harms suffered by consumers who fall into debt traps. The preamble to the Proposed Rule argues that consumers get trapped by legal obligations to pay outstanding debt because providers of payday loans and other consumer loans often fail to assess whether individual consumers have the ability to repay a given loan on top of existing financial commitments. According to the Bureau, the failure to assess the ability of individual consumers to repay a given loan puts many consumers in the position of having to decide whether to default on a legal obligation to pay an outstanding debt, fail to meet other major financial obligations or basic living expenses, or take on more debt.¹² According to the Bureau, these cycles have disastrous consequences for consumers when they ultimately decide to default on their outstanding legal obligations to repay their lenders. To address these concerns, the Bureau has proposed a rule that would transform the payday lending industry, the title loan industry, and the installment lending industry. Among other things, the proposed rule would require lenders to determine upfront that a borrower can afford to repay their loans without additional borrowing and while being able to service all existing debt and meet all major living expenses.

1. Activehours Is Like an ATM for Wages.

Activehours' service does not present the risks that the Proposed Rule seeks to prevent. Activehours does not lead to people mortgaging their future, instead it allows them to enjoy the benefits of the work they've already done. The Bureau's mandate is to make financial markets work for consumers. Restrictions on accessing one's earnings goes against this mandate.

2. Activehours' Service Does Not Create the Risk of a Cycle of Debt.

Activehours offers consumers the ability to smooth their income and match it with when their bills are due. Although the topic of income volatility has not received quite the level of attention as, e.g., income stagnation, income volatility is a significant issue for millions of U.S. households. According to a study by the J.P. Morgan Chase Institute, 41% of individuals experience a 30% swing in income month-to-month.¹³ These swings are more significant for individuals who are young, fall in the bottom quintile of monthly income, and live in the West. In addition, these individuals' expenses are often not stable and change significantly from week to week. The ability to synchronize income with expenses is extremely important.

As discussed above, Activehours' service offers users the ability to stabilize these income swings. Activehours is a wage acceleration service that provides workers with already-earned wages. Failure to repay a Cashout does not cause injury to anyone by Activehours. If an employer does not deposit a worker's wages or the worker cannot otherwise repay the Cashout, Activehours does not require repayment.

Further, Activehours has no right to collect from its users in the event that a user fails to repay a prior Cashout. If a user's account does not have funds sufficient to cover a Cashout and the user does not otherwise repay that Cashout, Activehours does not sell the worker's debt, does not seek to offset the debt based on collateral, and has no ability to attempt collection from any other assets. Activehours does

¹² *Id.* at 47864.

¹³ Diana Farrell & Fiona Greig, *Weathering Volatility Big Data on the Financial Ups and Downs of U.S. Individuals*, JP Morgan Chase & Co. Institute 3 (May 2015), <https://www.jpmorganchase.com/corporate/institute/document/54918-jpmc-institute-report-2015-aw5.pdf>.

not report non-payment to credit reporting agencies, and thus, nonpayment will not affect a worker's credit history or score. While a non-repaying worker will be barred from Activehours' service until he or she repays any outstanding Cashout, that worker will suffer no other adverse consequences. None of the consequences that motivated the Bureau to propose this rule – cycles of outstanding debt, high fees, or intrusive debt collection efforts – apply to Activehours. Activehours, through careful product design, takes steps to prevent its service from creating Non-Sufficient Funds (NSF) charges for its users. Activehours will not charge a user's bank account if the bank account does not contain sufficient funds to cover the Cashout, if the paycheck upon which a Cashout was premised is smaller than anticipated, or if the expected paycheck is never received. Unlike other loan products regulated by the Proposed Rule, Activehours users do not face penalty fees as a result of Activehours' activity.

3. Users Pay No Fees for Cashouts.

Activehours also does not charge any fees for use of its service. Unlike the payday loans covered by the Proposed Rule, the funds provided by Activehours are not subject to any finance charges or other fees. To the extent that Activehours earns any revenue from its users, it is a result of workers' voluntary tips. The use of Activehours' service will not trap consumers in a cycle of debt by racking up fees, finance charges, or ancillary costs. A worker with financial difficulties has no obligation to pay Activehours any fee for use of its service.

B. Non-Recourse Advances Should Be Excluded from the Proposed Rule for the Same Reasons that Non-Recourse Pawn Loans Are Excluded.

The Proposed Rule does not explicitly discuss non-recourse liquidity services such as Activehours', and Activehours does not believe that the Proposed Rule covers its service. The Proposed Rule does, however, specifically address another form of non-recourse liquidity—pawn. The Proposed Rule explicitly carves out pawn loans in which the pawnbroker takes possession of the item used to secure the loan. The same rationale that justifies excluding such pawn loans from the scope of the rule applies to services such as Activehours', and Activehours believes that the Bureau should add an express exemption mirrored on the pawn exemption to eliminate any doubt about whether services such as Activehours' are covered by the rule.

The Proposed Rule offers a very simple explanation for why non-recourse pawn loans are explicitly excluded from the rule. As the Proposed Rule explains, a pawnbroker that takes physical possession of the item used to secure a loan cannot collect from the general assets of the borrower in the event that the loan goes unpaid. According to the Proposed Rule, because a borrower incurs no additional financial obligation at the end of a pawn loan term, pawn loans are excluded from the rulemaking.¹⁴ "[I]n the event that a consumer is unable to repay the loan, the lender must accept the pawned item as fully satisfying the debt, without further collections activity on any remaining debt obligation."¹⁵

Like the non-recourse pawn loans described in the Proposed Rule, Cashouts are non-recourse. As noted above, if a user does not repay a Cashout, Activehours does not engage in any collections activity. The company does not sell user debt to a collections agency or report the debt to a credit bureau. Activehours bears the full risk of nonpayment; the user bears no additional financial obligation if she cannot repay an outstanding Cashout. Consequently, the same rationale by which the Bureau excluded non-recourse pawn loans from the Proposed Rule should apply to Cashouts. Cashouts do not present the risks to consumers that the Proposed Rule seeks to eliminate. As discussed above, Cashouts do not trap consumers in a cycle of debt or otherwise require consumers to incur financial obligations that they cannot afford. Like non-recourse pawn loans, Cashouts are simply not the type of credit product that the

¹⁴ *Id.* at 47867.

¹⁵ *Id.* at 47918.

Proposed Rule is intended to address and, like pawn loans, should be explicitly excluded from the scope of the Proposed Rule.

III. Non-Recourse Advances Should Be Excluded from the Rule Through Express Exceptions.

To ensure that providers of non-recourse liquidity services, such as Activehours, are not inadvertently covered by the Proposed Rule, we recommend several specific changes to the Proposed Rule's definitions.

First, because entities such as Activehours are not properly considered "lenders" under the Proposed Rule, we recommend that free, non-recourse advances be expressly excluded from coverage. Specifically, we recommend adding the following language to proposed 12 C.F.R. § 1041.2(11) (deletions in strikethrough; additions are underlined):

(11) Lender means a person who regularly extends loans to a consumer primarily for personal, family, or household purposes. Lender does not include a provider of non-recourse advances where no fee is tied to the extension of credit.

Second, to complement this revised definition the regulation should make clear that "covered loan" does not include non-recourse advances. We therefore recommend revising proposed 12 C.F.R. § 1041.3(e) as follows (deletions in strikethrough; additions are underlined):

(e) Exclusions. This part does not apply to the following types of credit:

(1) Certain purchase money security interest loans. Credit extended for the sole and express purpose of financing a consumer's initial purchase of a good when the credit is secured by the property being purchased, whether or not the security interest is perfected or recorded.

(2) Real estate secured credit. Credit that is secured by any real property, or by personal property used or expected to be used as a dwelling, and the lender records or otherwise perfects the security interest within the term of the loan.

(3) Credit cards. Any credit card account under an open-end (not home-secured) consumer credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(15)(ii).

(4) Student loans. Credit made, insured, or guaranteed pursuant to a program authorized by subchapter IV of the Higher Education Act of 1965, 20 U.S.C. 1070 through 1099d, or a private education loan as defined in Regulation Z, 12 CFR 1026.46(b)(5).

(5) Non-recourse pawn loans. Credit in which the lender has sole physical possession and use of the property securing the credit for the entire term of the loan and for which the lender's sole recourse if the consumer does not elect to redeem the pawned item and repay the loan is the retention of the property securing the credit.

(6) Non-recourse advances. Advances for which the lender's sole recourse if the consumer does not repay the advance is to refuse provision of an additional advance.

~~(6)~~ (7) Overdraft services and lines of credit. Overdraft services as defined in 12 CFR 1005.17(a), and overdraft lines of credit otherwise excluded from the definition of overdraft services under 12 CFR 1005.17(a)(1).

IV. Adopting Minor Revisions that Exclude Non-Recourse Advances Will Benefit Consumers.

Through the Proposed Rule, the Bureau seeks to ensure that consumers are not forced into debt they cannot afford. Because Activehours' service does not create a legal obligation to repay, Activehours believes that its service falls outside of the Proposed Rule as drafted. Activehours is, however, concerned about the potential for confusion about the scope of the Rule, and it urges the Bureau to make the minor changes suggested above to make this exclusion unambiguous. In Activehours' view, these revisions will protect consumers' access to products that benefit their financial well-being and support additional innovation.

I appreciate this opportunity to provide comments on the Proposed Rule. I am also available to participate in further dialogue or provide any additional information that the Bureau may require in its efforts to finalize the Proposed Rule. If you would like any additional information or to discuss my comments, please feel free to contact me at (415) 691-7243 or ram@activehours.com.

Thank you for your consideration.

Sincerely,



Ram Palaniappan
CEO, Activehours, Inc.

Exhibit A
Communications with Alaska Division of Banking and Securities



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Commerce, Community,
and Economic Development

DIVISION OF BANKING AND SECURITIES

550 West Seventh Avenue, Suite 1850
Anchorage, AK 99501
Main: 907.269.8140
Fax: 907.269.8146
Toll free: 1.888.925.2521

June 28, 2016

Ram Palaniappan, CEO
Activehours, Inc.
P.O. Box 456
Palo Alto, CA 94301

Dear Mr. Palaniappan:

It has come to the attention of the Alaska Division of Banking and Securities (Division) that Activehours, through the use of a mobile application, may be making or offering to make payday advances to Alaska residents.

If you are offering such payday advances, AS 06.50.010 of the Deferred Deposit Advances Act provides that a license is required to make such advances:

AS 06.50.010. License required. A person, including a person doing business from outside this state, may not engage in the business of making or offering to make deferred deposit advances in this state without having a license under this chapter. A separate license is required for each physical location or internet website from which the person conducts business.

This is to further advise you that under **AS 06.01.035**, the Division may issue an order against an individual or financial institution that violates a provision of this title and assess civil penalties as applicable.

I have included the address to our webpage where you will find a deferred deposit advance application as well as additional instructions regarding other items needed to complete an application. <http://commerce.state.as.us/dnn/dbs/Banking/Forms.aspx>

Please contact me with your response regarding this matter by July 15, 2016, as well as with any additional questions you may have regarding the application process. My contact information is: kristy.naylor@alaska.gov or 907-269-7675.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristy Naylor".

Kristy Naylor
Chief of Enforcement and Securities

1(415) 856-7248
tombrown@paulhastings.com

91117-00002

July 11, 2016

CONFIDENTIAL
VIA UPS AND EMAIL (KRISTY.NAYLOR@ALASKA.GOV)

Ms. Kristy Naylor
Chief of Enforcement and Securities
Division of Banking and Securities
Alaska Department of Commerce, Community, and Economic Development
550 West Seventh Avenue, Suite 1850
Anchorage, AK 99501

Re: Activehours, Inc.

Dear Ms. Naylor,

This letter is submitted on behalf of Activehours, Inc. ("Activehours") in response to your letter dated June 28, 2016, regarding the inquiry by the Alaska Department of Commerce, Community, and Economic Development (the "Department") as to whether Activehours offers payday advances to Alaska residents such that it is required to be licensed under the Deferred Deposit Advances Act (the "Act").¹

As explained further below, Activehours does not provide "deferred deposit advances" as defined under the Act. Accordingly, we believe that Activehours is not subject to licensure under the Act.

I. OVERVIEW OF ACTIVEHOURS' SERVICE

Activehours is a technology company that gives people easy access to the pay that they have earned—when they want, without waiting for payday. Activehours lets workers, rather than employers, control when workers get paid. It provides its service without mandatory fees, generating income entirely through a "pay what you think is fair" model. This flexibility allows workers to manage their cash flow and to spend their wages according to their own needs and schedule, not the arbitrary schedules that employers adopt to meet the minimum requirements of state labor laws.

In fact, the advent of monthly or biweekly paychecks is a relatively new phenomenon that appears to have been developed by employers at a time when the supply of labor was plentiful. Periodic pay schedules cause hardships for workers because workers' financial obligations do not always coincide with employer-chosen pay dates. Thus, the current system for wage delivery benefits employers at the expense of their workers. Workers often delay obtaining much needed goods and services or put off medical care until they receive their next paycheck. Yet there is simply no reason to delay wage payment in an era of on-demand technology. The problems associated with delayed delivery of wages can be solved through on-demand payment systems, such as that provided by Activehours.

¹ ALASKA STAT. § 06.50.010 *et seq.*

Ms Kristy Naylor
July 11, 2016
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The Activehours service is simple to use. When a user creates an account, Activehours automatically pulls a user's direct deposit and employment history. Activehours has integrated with several time and attendance systems to further expedite payment. Once Activehours verifies the hours a worker has worked, Activehours allows the worker to accelerate the distribution of her paycheck (based on the worker's expected take-home pay and subject to certain limits). Activehours deposits the funds directly into the worker's bank account either instantly or overnight (depending on the bank that the worker uses).

On the worker's regularly scheduled payday, Activehours automatically withdraws the amount of the advance from the worker's bank account. This allows workers to use Activehours directly, without relying on their employers. Activehours does not charge any fees for its service. Instead, workers may choose to pay a voluntary tip, which is automatically withdrawn, if authorized, on the worker's payday.

When Activehours accelerates a wage distribution to one of its users, Activehours, not the user, bears the risk of nonpayment by the employer and the risk of default by the worker. If the account to which the worker has provided Activehours access does not have sufficient funds to repay the accelerated wage distribution or if the user closes the account before the paycheck is scheduled to arrive, Activehours does not have the right to collect the accelerated wage from the user or the employer. Activehours' only recourse is to deny the user access to the service until the user pays the outstanding distribution.

In addition, failure to repay an accelerated wage distribution does not affect the user's credit. Activehours does not furnish information about its users to credit reporting agencies or other creditors. The only consequence for a user who reneges on the obligation to repay an advance is that he or she cannot receive another Activehours advance until the earlier advance is repaid.

II. ACTIVEHOURS DOES NOT OFFER "DEFERRED DEPOSIT ADVANCES"

Activehours does not provide "deferred deposit advances" as defined by the Act. Accordingly, Activehours should not be required to obtain a Deferred Deposit Advance license.

A. Overview of "Deferred Deposit Advances"

The Act states that a person "may not engage in the business of making or offering to make deferred deposit advances" in Alaska without a license.² "Deferred deposit advance" is defined to mean:

. . . a transaction in which a person

- A) accepts a dated check from a person seeking an advance;
- B) agrees to hold the check for a specified period of time before depositing or otherwise negotiating the check; and
- C) pays to the advance recipient, credits to the account of the advance recipient, or pays to another person on behalf of the advance recipient the amount of the check less the charges allowed under this chapter.³

² ALASKA STAT. § 06.50.010.

³ *Id.* at § 06.50.900(4).

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B. Activehours Does Not Accept and Hold Checks for Later Deposit

Activehours' advances do not fulfill Alaska's definition of "deferred deposit advance" for several reasons. First, Activehours does not "accept[] a dated check from a person seeking an advance" and "agree[] to hold the check for a specified period of time before depositing or otherwise negotiating the check". Activehours does not accept a negotiable instrument backed by unknown funds for later deposit. As described above, Activehours integrates with an employer's time and attendance system and advances a user's already-earned and verified funds. Unlike the traditional payday loans contemplated in the Act, Activehours does not enable people to accelerate wages that they have not earned and may not be able to afford to repay. Activehours automatically collects advances from its users, and it never puts workers in a position of default or forced re-borrowing.

C. Activehours Does Not Charge Fees for Advances

Second, Activehours does not charge fees for use of its service. The definition of "deferred deposit advance" requires that a lender advance funds to the advance recipient "*less the charges allowed*" under the Act. The Act specifically and exclusively contemplates a transaction in which a borrower *pays* for the privilege of receiving an advance. In contrast, however, Activehours does not charge users *any* fees for use of its service. Unlike payday loans, the funds advanced by Activehours are not subject to any finance charges or other fees.⁴ To the extent that Activehours earns any revenue associated with its service, it is a result of workers' *voluntary* tips. Consequently, an Activehours advance simply does not fit within the Act's definition of "deferred deposit advance."

D. Activehours Does Not Provide the Type of Service the Act is Designed to Regulate

Third, Activehours service is markedly different from the type of payday products the Act is designed to address. In general, payday lending laws are intended to protect consumers against unaffordable loans. The Act, itself, was intended to ensure that deferred deposit advance recipients did not get stuck in an extended sequence of reborrowing. As stated in the legislative history behind the Act, "[b]y limiting [deferred deposit advances] to two rollovers, the [Act's] main value is to prevent people from taking out a loan that they forever roll over."⁵ Similarly, a Senate fact sheet for the Act explained that "[i]n states that do not [regulate payday lenders], fees for these types of loans can be exorbitantly high, with unlimited 'rollovers' that trap borrowers in a cycle of debt. Likewise, without regulation, internet-based lenders . . . often charg[e] extreme fees."⁶

⁴ Cf. *In the matter of: Alaska Prepaid Card, LLC d/b/a Quynana Card Respondent*, 2016 Alas. Sec. LEXIS 7 (Mar. 21, 2016) (finding that Respondent had engaged in unlicensed deferred deposit advances where the terms of the advance "generally included 15% interest for each \$100.00 of an advance, with a \$ 5.00 fee added to each advance....Additional interest and fees were charged every two weeks on unpaid advances...").

⁵ Statement of Richard Schmitz, Staff to Senator John Cowdery, Minutes of the House Finance Committee at p. 3, Senate Bill #272, May 6, 2004, <http://www.legis.state.ak.us/pdf/23/M/HFIN2004-05-061540.PDF>.

⁶ Fact Sheet for: Senate Bill 272, Alaska State Legislature, Senate Majority, May 11, 2004, http://www.akrepublicans.org/cowdery/23/pdfs/fact_sb272.pdf.

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In contrast to the payday loans that spurred passage of the Act, Activehours service does not trap consumers in a cycle of reborrowing. In fact, Activehours assumes the risk of non-payment associated with its advances. If an employer does not deposit a worker's wages or the worker cannot otherwise repay the advance, Activehours does not require repayment. Moreover, Activehours has no right to collect from its users in the event that a user fails to repay a prior advance. If a user's account does not have funds sufficient to cover an advance and does not otherwise repay that advance, Activehours does not sell the worker's debt, does not seek to offset the debt based on collateral, and has no ability to attempt collection from any other assets of the worker. Activehours does not report non-payment to credit reporting agencies, and thus, nonpayment will not affect a worker's credit history or score. While a non-repaying worker will be barred from Activehours' service until he or she repays any outstanding advance, that worker will suffer no other adverse consequences. As such, it is difficult to see any potential consumer harm resulting from Activehours' service, let alone the positive debt cycles that the Act is designed to address.

III. CONCLUSION

As described above, Activehours does not provide "deferred deposit advances" as defined by the Act. Activehours does not accept and hold checks thus, enabling consumers to accelerate funds that they have not yet earned. Instead, Activehours advances already-earned wages to workers in advance of their biweekly or otherwise periodic payday. With no finance charge or other fees associated with the provision of an advance, Activehours does not collect its advance "less the charges allowed" by the Act; Activehours accepts no fees whatsoever. Therefore, Activehours' advance does not fulfill the statutory criteria necessary to be characterized as a "deferred deposit advance."

Further, with no finance charge, no right to repayment, and no possibility of continuous reborrowing, Activehours' service is far removed from the cycle of debt that the Act seeks to regulate. To the contrary, Activehours provides a much-needed financial benefit to its consumers.

As explained in the analysis above, we do not believe that Activehours should be subject to licensure under the Act. We respectfully request the Department's concurrence with this conclusion, and would welcome the opportunity to meet with the Department, either in person or by phone, to discuss this matter further to the extent that would be helpful.

* * *

We respectfully request confidential treatment for this letter and the information included herewith pursuant to Section 06.55.407 of the Act (ALASKA STAT. §§ 06.55.101, *et seq.*), which provides that all information or reports obtained by the State of Alaska Department of Commerce, Community & Economic Development from a licensee are confidential and not subject to disclosure under the Alaska Public Records Act, Sections 40.25.100–40.25.295.

If, notwithstanding the foregoing, the Department should decide to make any of this information available to the public, please inform me prior to doing so.

* * *

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We sincerely appreciate your time and consideration with respect to this matter. Should you have any questions or require any further information, please do not hesitate to contact me at (415) 856-7248 or at tombrown@paulhastings.com.

Sincerely,



Thomas P. Brown
of PAUL HASTINGS LLP

cc: Ram Palaniappan, CEO
Activehours, Inc.

From: Naylor, Kristy M (CED) <kristy.naylor@alaska.gov>
Sent: Tuesday, July 19, 2016 12:34 PM
To: Swartz, Molly E.
Cc: Brown, Thomas
Subject: RE: Activehours, Inc.'s Response to the Division's Letter Dated June 28, 2016

Ms. Swartz,

We have received and reviewed Mr. Brown's letter to the Division of Banking and Securities on behalf of Activehours, Inc. and consider this matter to be closed. Thank you and Mr. Brown for your quick and thoughtful attention to our inquiry.

Sincerely,

Kristy M. Naylor

Chief of Enforcement and Securities
Alaska Department of Commerce, Community, and Economic Development
Division of Banking and Securities
550 W. 7th Avenue, Suite 1850
Anchorage, AK 99501
Phone: 907.269.7675
Fax: 907.269.8146

From: Swartz, Molly E. [<mailto:mollyswartz@paulhastings.com>]
Sent: Monday, July 11, 2016 2:52 PM
To: Naylor, Kristy M (CED)
Cc: Brown, Thomas
Subject: RE: Activehours, Inc.'s Response to the Division's Letter Dated June 28, 2016

My apologies. Now with attachment.

From: Swartz, Molly E.
Sent: Monday, July 11, 2016 3:51 PM
To: 'kristy.naylor@alaska.gov'
Cc: Brown, Thomas
Subject: Activehours, Inc.'s Response to the Division's Letter Dated June 28, 2016

Ms. Naylor,

Attached please find a response from Thomas P. Brown on behalf of Activehours, Inc. in response to the Alaska Division of Banking and Securities' letter dated June 18, 2016 regarding Activehours' status under Alaska's Deferred Deposit Advances Act. Hard copy to follow via UPS. Please don't hesitate to let us know if you need additional information.

Thank you for your assistance,

Molly Swartz



Molly E. Swartz | Associate

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